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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation	MM Docket No. 92-266

REPLY COMMENTS OF

NEWHOUSE BROADCASTING CORPORATION

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Dated: February 11, 1993

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SUMMARY

In its initial comments, Newhouse Broadcasting Corporation ("Newhouse") addressed a wide range of issues relating to the implementation of the rate regulation provisions of the 1992 Cable Act. In these reply comments, Newhouse focuses on several specific issues. With respect to all of these issues, Newhouse's principal concern is the same: that the Commission not adopt rules that will have the effect of penalizing "good" cable operators who have historically offered service at relatively low rates.

More specifically, Newhouse urges the Commission to take the following actions:

- The Commission must ensure that operators are allowed to offer a small basic tier. Consistent with Congress' intent that subscribers have the opportunity to obtain a "low-priced" tier of basic service, franchise provisions requiring the provision of a "big" basic must be deemed preempted. At the very least, operators must be allowed to create a small basic tier below any expanded tier mandated by a franchise.

- Cable operators must be given time to adjust to the new rules. In particular, operators should be given an opportunity to retier their services before rate regulation becomes fully effective. To ensure fairness in this process, subscribers could be exempted from downgrade charges for a limited period of time after a system creates its new basic tier.

- Cable operators must not be artificially restrained from reaching the benchmark level. A system with below-benchmark rates may need to raise its rates in order to upgrade its plant and service. The public interest is not served by restrictions (e.g., price caps; limits on annual increases) on a system's ability to raise rates to the benchmark level.

- The Act permits "below-the-line" itemization of a wide range of governmentally-related costs. Congress' goals in authorizing itemization included increasing public scrutiny of governmentally-impost costs and protecting cable systems from unfairness in the regulation of their rates. Limiting the types of governmental costs that can be itemized and requiring the itemization of costs to be "hidden" will frustrate these goals.

- Financial data should be collected and disclosed only where absolutely necessary. The collection and dissemination of proprietary financial data in the absence of an actual rate controversy is unnecessary, inconsistent with the Act, and potentially harmful, particularly to privately-held companies such as Newhouse.

- Franchising authorities should bear the burden of establishing the absence of effective competition. While there may be need for a brief transition period, there is no basis for creating a presumption that effective competition does not exist.

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REPLY COMMENTS OF NEWHOUSE BROADCASTING CORPORATION

Newhouse Broadcasting Corporation ("Newhouse"), by its attorneys, hereby submits its reply comments in the above-captioned proceeding. In its initial comments, Newhouse addressed a wide range of issues relating to the implementation of the rate regulation provisions of 1992 Cable Act, stressing throughout that it was important for the Commission not to adopt rules penalizing "good" cable systems that had kept rates at relatively low levels over the years[1]. In these reply comments, Newhouse will focus briefly on a few specific issues. Again, however, the underlying theme is the same: "good" operators should not be disadvantaged by the Commission's rate regulation rules.

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[1]Comments of Newhouse Broadcasting Corporation, MM Docket No. 92-266 (filed Jan. 27, 1993) ("Newhouse Comments").

I. CABLE OPERATORS MUST BE PERMITTED TO OFFER SMALL BASIC TIERS

In its initial comments, Newhouse argued that the 1992 Cable Act preempts franchise provisions that require the carriage on the basic service tier of services other than those specified in Section 623(b)(7) of the 1992 Cable Act.[2] Several commenters take the opposite position as Newhouse, arguing that franchising authorities may enforce existing (and new) franchises requiring the provision of a "big" basic.[3]

Newhouse continues to believe that, in order to carry out the statutory goal of ensuring the availability of a relatively low priced basic service, Congress intended the 1992 Cable Act to preempt franchise provisions requiring the carriage of additional services on basic.[4] Newhouse has implemented low cost (generally $3.00 or less per month) "lifeline" tiers of service in all of its systems during the past few years. Restoration of "big" basic requirements would force the abandonment of these tiers to the ultimate detriment of the public, particularly the elderly and others with low or fixed incomes.

Consequently, the Commission at the very least should acknowledge that the Act permits cable operators to create a small basic tier below any combination of services specified by a

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[2]Newhouse Comments at 6-8. See also Continental Cablevision Comments at 13.

[3]See, e.g., Comments of Austin, TX, et al. at 22-23; Comments of League of California Cities at 12.

[4]H.R. Rep. No. 628, 102d Cong., 2d Sess. 82 (1992).

franchise. Thus, where a franchise calls for the provision of a large "basic" tier, the system, consistent with Section 623(b)(7), must be allowed to establish a small basic tier that will be subject to local rate regulation, leaving the larger tier subject to non-basic, "bad actor" regulation.[5]

II. CABLE OPERATORS MUST HAVE TIME TO ADJUST TO THE NEW RULES

As Newhouse pointed out in its initial comments, the Act does not require the Commission's rate regulation rules to take effect all at once.[6] Indeed, operators will need time to adapt to the new rules, including time to make changes in the way equipment is offered (i.e., unbundling), to comply with notice requirements, to prepare educational and marketing requirements, etc. Newhouse has proposed January 1, 1994 as the earliest possible date for making fully effective the new rate requirements.[7]

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[5]As part of its decision, the Commission also should reiterate that, pursuant to Section 625(d) of the 1984 Cable Act, systems not subject to basic rate regulation prior to the effective date of the rate provisions of the 1992 Cable Act could freely rearrange their service offerings notwithstanding any franchise requirements to the contrary and that the reinstitution of regulation under the 1992 Act does not invalidate such retiering or require the system to restore services to the basic tier. See Report and Order and Second Further Notice of Proposed Rulemaking, MM Docket Nos. 90-4 and 84-1296, 69 RR 2d 671, 691-92 (1991) (Section 625 proscribes ability of Commission or franchising authorities to interfere with retiering of unregulated tiers).

[6]Newhouse Comments at 50-52. See also NCTA Comments at 84-85.

[7]Id.

With respect to this issue, some of the commenters have argued that cable operators not only should be denied any time to adjust to the Act, but also should be broadly prohibited from "retiering" under the "evasions" section of the Act.[8] Whether or not there are circumstances where a retiering decision could be regarded as an evasion, Newhouse submits that there is no basis, as a matter of law or policy, for the Commission to interfere with an operator's right to retier where such retiering is not accompanied by an overall increase in the rates for the services involved.[9] Moreover, Newhouse is not opposed to the proposal, put forth by the New York State Commission on Cable Television, that a subscriber be exempted from any "downgrade charge" for a limited period (e.g., 45 days) following notification of the operator's intent to retier service.[10]

III. CABLE OPERATORS MUST NOT BE ARTIFICIALLY RESTRAINED FROM REACHING THE BENCHMARK LEVEL

Newhouse is particularly concerned that operators with rates that fall below the permitted "benchmark" level not be artificially restrained from increasing their rates to approach or meet those benchmarks. Such a result would penalize systems

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[8] See, e.g., Comments of Austin, TX, et al. at 24.

[9] Cf. CFA Comments at 76.

[10] Comments of the New York State Commission on Cable Television at 19. Of course, the Commission should make clear that the 1992 Act recognizes the right of cable operators to impose downgrade charges and that franchising authorities may not prohibit or unduly limit such charges. See 47 U.S.C. §543(b)(5)(C).

for being "good" operators -- operators who have kept their rates relatively low by virtue of prudent business practices.

Thus, for example, the Commission should not adopt a "price caps" approach that would restrict the ability of operators to increase below-benchmark rates.[11] Nor should the Commission prevent a cable operator from implementing rate increases that do not exceed the benchmark following the 30-day notice to the franchising authority required by Section 623(b)(6). These and similar restrictions would impair the ability of below-benchmark systems (particularly those that have lagged behind in the deployment of new technology) from updating their systems to the benefit of their subscribers.

IV. THE COMMISSION MUST PERMIT "BELOW-THE-LINE" ITEMIZATION OF FRANCHISE COSTS ON SUBSCRIBER BILLS

As Newhouse indicated in its initial comments, Section 622(c) of the 1992 Cable Act expressly authorizes cable operators to identify "as a separate line item" on subscriber bills costs related to various franchise requirements, including costs associated with PEG access channels and franchise fees.[12] This provision promotes greater public knowledge and scrutiny of the portion of a cable operator's bill that represents governmentally-imposed costs, and greater political

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[11] See, e.g., Newhouse Comments at 15-16; NCTA Comments at 28-29.

[12] Newhouse Comments at 30-34.

accountability for the imposition of such costs.[13] It also helps to ensure that governmental costs are properly accounted for in the establishment of benchmark rates and in the enforcement of the "geographic uniformity" requirement.

Notwithstanding the public benefits of itemization, a number of municipal commenters have suggested a narrow construction of Section 622(c) that would effectively gut this provision. In particular, these commenters argue that Section 622(c) does not allow operators to list governmental costs as separate items "below-the-line."[14] Other commenters express an unreasonably narrow view of the types of governmental costs that can be itemized under Section 622(c).[15]

In order to ensure that the goals underlying Section 622(c) are achieved, the Commission must reject interpretations that would unduly narrow the provision's scope. Consistent with the plain language of the provision, the Commission should find that all governmentally-imposed charges including charges, related to customer service obligations, PEG access, franchise fees, etc., may be itemized on a separate line below the operator's service rate (and above the total due). Only in this way will this provision serve to restrain unreasonable demands by

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[13]See, e.g., Time Warner Comments at 106-07; Continental Cablevision Comments at 76-77, 79.

[14]See, e.g., Comments of Dade County at 13-14; Comments of the New York State Commission on Cable Television at 29.

[15]See, e.g., Comments of NATOA/NLC at 91-93; City of Palm Desert Comments at 18-22.

municipalities and to ensure that a system's rates fully and accurately reflect the particular level of governmental costs that the system is forced to incur.[16]

V. THE COMMISSION SHOULD REQUIRE DISCLOSURE OF FINANCIAL DATA ONLY TO THE EXTENT ABSOLUTELY NECESSARY

Newhouse, as a privately-held company, is particularly concerned about the imposition of financial reporting requirements under Section 623(g) of the Cable Act. As we stated in our initial comments, cable operators should not be required to file financial information with local authorities on a regular basis.[17] Moreover, it is critical that, whenever financial data must be submitted, steps be taken to ensure that the confidentiality of proprietary information is protected.

Completely ignoring the legitimate concerns of companies such as Newhouse, some commenters have urged that information be broadly collected and widely disseminated. For example, USTA urges the collection of cost data, "whether or not the Commission adopts a benchmark or cost of service alternative."[18] And NARUC has proposed that information

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[16]Thus, for example, if the Act's "geographic uniformity" provision is held to apply on a system-wide basis, below-the-line itemization will allow systems to demonstrate that their net rates are uniform and that any differences in gross rates are attributable to differences in governmentally-imposed costs. In addition, itemization helps to ensure that subscribers do not bring unwarranted "bad actor" complaints when rates for cable programming service are increased to reflect governmental costs.

[17]Newhouse Comments at 48. See also Cox Cable Comments at 75-78.

[18]USTA Comments at 15.

collected by the Commission pursuant to Section 623(g) be made available to the general public as part of the Commission's files or a computer database.[19]

Such proposals for the broad collection and dissemination of sensitive financial data are wholly at odds with the intent of Section 623(g), which expressly provides that the Commission is to collect only such information as is "necessary to administer and enforce" rate regulation. Assuming the adoption of a benchmark approach, there is absolutely no reason for the Commission to collect cost data. Moreover, any information collected by the Commission should not be disclosed to franchising authorities unless and until such information is needed to resolve a rate controversy and only under conditions designed to protect against the general dissemination and publication of such information.

VI. FRANCHISING AUTHORITIES MUST DETERMINE WHETHER EFFECTIVE COMPETITION EXISTS BEFORE SEEKING CERTIFICATION TO DEREGULATE BASIC RATES

The various commenters in these proceedings differ as to the procedures for determining whether a cable operator is subject to "effective competition." Some parties agree with the Commission's proposal to require franchising authorities to demonstrate the absence of effective competition in their certification requests.[20] Other commenters (principally

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[19]NARUC Comments at 5.

[20]NPRM at ¶17. See Comments of Falcon Cable Group at 18-19.

municipalities) argue that the cable operator should bear the burden of demonstrating the presence of effective competition or that the absence of effective competition should be presumed for purposes of the certification process.[21]

Newhouse did not comment on this issue in its initial comments. However, we feel very strongly that the local franchising authority (or possibly the Commission) must be responsible for collecting the data necessary to determine whether or not effective competition exists and that a determination based on such data must be made before a local franchising authority is certified to regulate rates. There should not be a general presumption that systems are not subject to effective competition.[22]

Respectfully submitted,

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[21]See Comments of Austin, TX et al. at 33; Comments of NATOA/NLC at 24-25. Comments of Baltimore at 5-6.

[22]Recognizing that the data needed to determine the existence of effective competition will have to be gathered, Newhouse proposes that a short, interim "grace" period be established where regulation is permitted. However, once this period ends, the burden should fall on the franchising authority to demonstrate that effective competition does not exist and that continued regulation is permissible.